

1 APPEARANCES:

2 FOR THE PLAINTIFF: (See Attorney Attendance Sheet docketed
in minutes of this hearing.)

3

4 FOR THE DEFENDANT: (See Attorney Attendance Sheet docketed
in minutes of this hearing.)

5

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11 (Proceedings recorded by mechanical stenography, transcript
produced on a CAT system.)

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April 2, 2019

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1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Be seated, please.

3 Good morning, counsel. This is the time set for a
4 hearing on a motion to compel in the Implicit versus
5 NetScout matter. That's Case No. 2:18-CV-53, which is also
6 consolidated with Implicit versus Sandvine, which is
7 2:18-CV-54.

8 This is Plaintiff, Implicit's, motion to compel,
9 Docket 78.

10 Let me call for announcements on the record.

11 What says the Plaintiff, Implicit?

12 MR. DAVIS: Good morning, Your Honor. Bo Davis on
13 behalf of the Plaintiff, Implicit, and I'm ready to
14 proceed.

15 THE COURT: All right. What's the announcement
16 from Defendants?

17 MS. SMITH: Good morning, Your Honor. Melissa
18 Smith, Mr. Eric Buresh, and Mr. Mark Lang on behalf of both
19 Defendants, Sandvine and NetScout, and we're ready to
20 proceed, Your Honor.

21 THE COURT: All right. Thank you.

22 Before we get into the motion to compel and so I
23 don't forget it later in the morning, it's been called to
24 my attention that with regard to the upcoming claim
25 construction set for the 11th of this month before

1 Magistrate Judge Payne that the parties have not filed
2 their 4-5 claim construction charts, even though you asked
3 for and I gave you or you got an extension on that.

4 I'd like some indication from both sides as to why
5 not and -- well, let's start with why not.

6 Mr. Davis, any idea from the Plaintiff as to why
7 this didn't happen?

8 MR. DAVIS: Your Honor, I think the delay is due
9 in part to, I think, trying to coordinate and make sure we
10 had the terms right. But, overall, I believe it's just
11 a -- an oversight on the part of the parties. We've been
12 working on it. We're in the process of finalizing a draft
13 to send over to the other side. So if anything, you know,
14 the Plaintiff usually bears the -- the burden to take the
15 first stab at this, and we were working on it.

16 THE COURT: That stab has been worked on, but it
17 hasn't been taken?

18 MR. DAVIS: It's -- it's -- I believe it -- it
19 should be sent over first thing this morning. And I think
20 yesterday it fell -- fell through the cracks. So I believe
21 the 4-5(d) chart is -- is being sent over this morning and
22 should be -- you know, we'll work with the Defendants as
23 quickly as possible to get it on file today. And I
24 apologize for that. There's really no excuse that I can
25 provide, Your Honor, as to why it didn't happen. It just

1 fell through the cracks.

2 THE COURT: All right. Ms. Smith, do you or any
3 of your co-counsel have anything to add from the
4 Defendant's standpoint on this?

5 MS. SMITH: No, Your Honor. But both parties
6 allowed it to fall through the cracks, obviously. But we
7 will turn it around just as quickly as Mr. Davis gets it to
8 us and -- and get it to Your Honor.

9 THE COURT: All right. Well, I'll trust that
10 that's going to happen. I don't want Judge Payne to be
11 handicapped in any way when claim construction comes before
12 him for hearing on the 11th. So I'll make sure he knows
13 that I've raised it with you, and I'll make sure he knows
14 that you've represented it's going to be done post haste.

15 MS. SMITH: Understood, Your Honor.

16 THE COURT: Okay. Thank you.

17 Let's turn to the motion to compel.

18 Mr. Davis, this is Plaintiff's motion. Let me
19 hear from you on this first, please.

20 MR. DAVIS: Yes, Your Honor. May I approach, Your
21 Honor?

22 THE COURT: You may.

23 MR. DAVIS: I have binders.

24 THE COURT: Proceed when you're ready.

25 MR. DAVIS: Thank you, Your Honor.

1 Good morning, Your Honor. May it please the
2 Court. Bo Davis on behalf of the Plaintiff, Implicit, LLC.

3 We filed this motion asking for the Court to enter
4 an order that Defendants, NetScout and Sandvine, produce
5 documents on products that are reasonably similar to the
6 products that are accused in this lawsuit.

7 And I understand the Court's standard for what it
8 requires to seek discovery on reasonably similar products.
9 And that's, I think, articulated well in the -- in the
10 GeoTag case, which the parties have cited here, and that
11 there's really a two-prong showing that has to be made.

12 The first is that the Defendants were on notice of
13 an infringement theory.

14 And, second, that the products that we seek
15 discovery on are reasonably similar.

16 And so I'd like to address the Court's standard
17 for reasonably similar products by walking the Court
18 through some of the evidence in the case and showing that,
19 number one, we did produce -- that we did disclose an
20 infringement theory -- a specific infringement theory to
21 the Defendants, and that the products we seek discovery on
22 are reasonably similar to -- to the products that are
23 accused.

24 And I've passed out for the Court a binder with
25 evidence in it. And the first thing I'd like to direct the

1 Court to is Tab 2, which is the claim chart for one of the
2 patents in -- in the lawsuit, the '683 patent. And I just
3 used the '683 patent as an exemplary -- as an exemplar
4 because I believe it's representative. And I don't believe
5 there's any significant differences that matter for
6 purposes of this motion.

7 So using the '683 patent, what I'd like to do is
8 just walk the Court through this chart and explain where
9 we've -- the theory that we've disclosed. And the Court
10 is -- has history with these patents, the claims at issue
11 in the case.

12 And, essentially, what the claims are talking
13 about in Claim 1 is an apparatus for receiving data for --
14 from a second apparatus, claims -- or Elements 1a on Page 2
15 of Tab 2 are the processing unit; 1b is a memory; 1b1 is
16 where we get into the meat of the claim. And here it says
17 that we create, based on identification of information in a
18 received packet of a message, a path that includes one or
19 more data structures that indicate a sequence of routines
20 for processing packets in the message.

21 And what we've identified as the infringing
22 component or function of this element is in the -- well,
23 let me back up and just say that we -- what we've
24 identified specifically is a NetScout product called the
25 nGeniusONE Service Assurance platform.

1 And so with respect to this nGeniusONE platform,
2 what we've identified is language in public information
3 that discloses that this product does what is essentially
4 flow-based processing. And we've highlighted some portions
5 of the publicly available information that talk about
6 flow-based processing and deep packet inspection.

7 And you can see here on Page 3, the highlighted
8 text says: Next generation deep packet inspection engine
9 that relies on packet flow data to provide real-time
10 contextual analysis of service, network, and application
11 performance.

12 And we've highlighted numerous other places in the
13 public data for this product that we believe discloses that
14 the product is performing flow-based data processing.

15 I think it's also worth mentioning that part and
16 parcel with this notion of flow-based processing is deep
17 packet inspection or packet analysis. And that become --
18 comes into play, I think, in the -- in the next limitation
19 when we get to the limitation that deals with TCP
20 conversion.

21 But what we've identified here is we're looking at
22 products that have a flow-based analysis, flow-based data
23 processing, deep packet inspection.

24 If we move on, Element 1b2 talks about storing the
25 created path, and there's similar language that we've

1 highlighted there.

2 And then we get down to -- on -- at the bottom of
3 Page 7, Element 1b3, which is processing subsequent packets
4 in the message.

5 THE COURT: Let me ask you this, counsel.

6 MR. DAVIS: Yes, Your Honor.

7 THE COURT: You've -- you've said that you're
8 looking at products that have flow-base -- flow-based
9 analysis, flow-based data processing, and deep packet
10 inspection.

11 MR. DAVIS: Yes, Your Honor.

12 THE COURT: Where in that litany is layer 7
13 inspection. And if it's not there, is that part of what
14 you're looking at, as well?

15 MR. DAVIS: Well, layer 7, Your Honor, is the
16 application layer, and so when we get to layer 7 -- layer 7
17 doesn't really come into play until we get to this -- this
18 last element, the T -- the element that has the requirement
19 that there be a TCP conversion. And so that's where we get
20 to application layer inspection where the claims require
21 execute a transmission control protocol to convert one or
22 more packets having a TCP format into a different format.

23 And so that element -- it doesn't say application
24 layer inspection. We recognize that. But when you convert
25 from TCP format into another format, you're converting from

1 the TCP layer to a higher layer which ultimately you get to
2 layer 7 which is the application layer.

3 And so when we see the words "deep packet
4 inspection," that's where, you know, we see a -- a flag for
5 potential TCP conversion.

6 And so that's what we get to on Pages 8 and 9. We
7 have dis -- disclosure here where for this product, the
8 nGeniusONE product, there's -- there's clear disclosure in
9 the public data that -- that it -- that it appears to be
10 doing a TCP conversion. And we know that because it says
11 TCP.

12 And right here on Page 8, to further harden
13 security, access to the system and the data is restricted
14 to only essential TCP/UDP -- UDP ports. And while that is
15 not specifically saying we do a TCP conversion, it does --
16 it is disclosing that they work on TCP traffic.

17 And so when you combine this with the concept of
18 deep packet inspection, which we continue to highlight on
19 Page 10 where we have this graph that shows a number of
20 different layers, and at the -- at the bottom, deep-dive
21 packet analysis, what that tells us is this product is --
22 is doing TCP conversion at the application, and it's
23 looking into the application layer. And, overall, we have
24 a pretty good idea that this is doing what we think the
25 claims are teaching.

1 And so we feel there -- therefore, we can accuse
2 this product, we can satisfy Local Patent Rule 3-1 to
3 provide a chart that specifically identifies which
4 functionality in the products is infringing on the patents.

5 And, of course, for all of these, Your Honor, we
6 relied on 3-1(g), which is the source code provision that
7 allows us to -- to amend the contentions to rely on source
8 code, which we did.

9 And so that was the next thing that I wanted to
10 show Your Honor was to match our original contentions up
11 with what we then did in our source code contentions that
12 we served on the Defendants.

13 THE COURT: Well, let me ask you this --

14 MR. DAVIS: Yes, Your Honor.

15 THE COURT: -- Mr. Davis. You're asking the Court
16 to compel the production of documents and information
17 regarding reasonably similar products.

18 MR. DAVIS: Yes, Your Honor.

19 THE COURT: And you say in your briefing that your
20 contentions, your 30(b)(6) notices, and your
21 interrogatories all support this and have given notice of
22 same to the Defendants. But I don't see in your briefing
23 anywhere where you've attached your contentions, your
24 30(b)(6) notices, or your interrogatory questions and
25 answers.

1 You -- you've dropped in some quotes along the way
2 in your briefing, but you really haven't given me the
3 underlying and supporting documents to confirm your
4 representations about the notice that you've given.

5 Is there a reason that they're not part of the
6 briefing and not really before the Court?

7 MR. DAVIS: Yes, Your Honor.

8 THE COURT: It would be helpful if they were.

9 MR. DAVIS: Understood, Your Honor.

10 And I believe the reason is when we were putting
11 this motion together, given that it was a -- a motion to
12 compel discovery, we were operating under Your Honor's
13 standing order with respect to the limits on pages and
14 exhibits. And I don't -- so I think we were taking the
15 very streamlined approach to what we were putting in front
16 of Your Honor. And perhaps we should have filed a motion
17 for leave to exceed those limits and -- and attach this
18 evidence. And if so, then --

19 THE COURT: Well, in hindsight, that probably
20 would have -- that probably would have been helpful to the
21 Court. And motions for leave to exceed page limits are
22 not a -- not a rarity when there's supporting documentation
23 that's relevant.

24 But I'm not questioning the accuracy of your
25 representations. I'm just saying I have selected quotes

1 that you've dropped into your briefing, but I don't have
2 the entirety of the supporting documents. And I don't find
3 that the Defendants are telling me you've misquoted or
4 you've misrepresented, but, you know, if I had the totality
5 of what you're relying on before me, it would certainly
6 resolve any possible issue there.

7 MR. DAVIS: I understand, Your Honor, and we
8 apologize for that. The Court would have benefitted from
9 more time to -- to review all this.

10 And I do -- I do think that the fundamental
11 disagreement here is -- as I understand the Defendant's
12 position, is that they don't believe these other products
13 are reasonably similar because they were from a different
14 company, they have a different code base, and, therefore,
15 they're -- they're not reasonably similar.

16 And I -- and I feel like there's a fundamental
17 disadvantage that we're put in when we're -- when
18 essentially they're asking us to tell them something we
19 don't know, which is you have to show us how these
20 products -- these -- that you claim are reasonably similar
21 function in a manner that's similar to the products you've
22 accused when we don't have the discovery to know how these
23 product -- that the products we want to -- in discovery to
24 work.

25 And so I don't think the standard is does the code

1 work the same? Is the code reasonably similar? I think
2 it's proper to abstract to a functional level and say, we
3 believe these claims cover flow-based processing that, you
4 know, operates at the TCP layer and beyond. And to
5 identify products that we have public information on, and
6 then to say, look, you have a whole bunch of products.

7 If you go to their website, there are dozens and
8 dozens of products that all seem to be related, and they've
9 got marketing names, but when you dig into them, they seem
10 to be the same thing. And it becomes very confusing.

11 And we didn't realize until we got into the
12 deposition that some of these products were products that
13 were acquired from other companies. But I don't think that
14 matters.

15 And I think at the end of the day, they know what
16 our infringement theory is, and we've asked them to tell us
17 which other products have similar functionality so we can
18 decide whether or not they need to be in this lawsuit; and
19 if so, then we would file a motion for leave to amend our
20 contentions and satisfy the good cause standard there,
21 and -- and move forward.

22 THE COURT: I understand your -- what I'll call
23 chicken or the egg argument that you can't do one thing
24 until you have the other from which to base it.

25 MR. DAVIS: Yes, Your Honor.

1 THE COURT: I understand that.

2 MR. DAVIS: Okay. And so I'm -- I'm happy to
3 continue to walk through the evidence here and show Your
4 Honor where we then pointed to in the code specific
5 routines that we believe support our infringement theory.

6 But I think at the end of the day, they were on
7 notice, not only from our contentions, but throughout the
8 meet and confer process, the -- when we were told we
9 weren't going to get this discovery, we met and conferred.
10 We -- we told them what we wanted. We served
11 interrogatories -- we served a deposition notice to try to
12 get the information.

13 We ultimately did get it through a 30(b)(6)
14 witness who said: Yes, these other -- there are other
15 products that do what -- what you're -- what you're
16 interested in.

17 THE COURT: That's Mr. Barrett?

18 MR. DAVIS: Yes, Your Honor.

19 THE COURT: Okay.

20 MR. DAVIS: And so we -- we -- you know, we -- we
21 did that, and once we got that deposition testimony, we
22 felt like we had enough to -- to come before the Court and
23 ask for -- for relief on this.

24 And, you know, so I think we're -- I'm happy to
25 walk the Court through the rest of this and -- and show

1 where we did it and the source code for both Procera -- I'm
2 sorry, for NetScout and Sandvine.

3 THE COURT: Let me ask you this, Mr. Davis. It's
4 clear from the Defendant's briefing that they're relying to
5 some extent on TiVo versus Samsung, saying that the ability
6 to bring in similarly -- reasonably similar products
7 shouldn't be used as a broad-brush way to sweep in a myriad
8 of things that don't really relate.

9 MR. DAVIS: Yes, Your Honor.

10 THE COURT: And -- and I'm familiar with that
11 case. I'm familiar with the language used in the
12 contentions there, but I'd be interested in your response
13 to that, whether you think it's applicable or not, and if
14 you think it's distinguishable, which I think you probably
15 do, tell me why you think it's distinguishable.

16 MR. DAVIS: Well, I do think it is
17 distinguishable, Your Honor, because we are in this
18 situation asking for products that do operate in a
19 reasonably similar manner. They were on notice of how they
20 operated. And, frankly, we couldn't tell from the publicly
21 available information that they were -- that they were
22 doing what we thought they might be doing.

23 And so I think we're, you know, in a different
24 situation where -- than TiVo or even the GeoTag case where
25 there were facts in those cases that -- especially in the

1 GeoTag case where, you know, the Plaintiff was trying to
2 add a product that it had accused against other Defendants
3 that was publicly available that there really was no good
4 reason why they couldn't have added it before. I don't
5 think we're in that situation.

6 And I don't think we're trying to -- you know,
7 we're not -- our understanding is that if the Court allows
8 discovery into these products, we still then have to move
9 to compel -- or move for leave to amend our contentions.
10 So we then have to satisfy the good cause standard.

11 We're happy to, you know, address that now, but I
12 think it's -- we're going to be in a situation where --

13 THE COURT: I think it's premature to address that
14 now.

15 MR. DAVIS: Thank you, Your Honor. So I --

16 THE COURT: Let me ask you this, Mr. Davis.

17 MR. DAVIS: Yes.

18 THE COURT: Part of your motion seeks relief with
19 regard to production of financial data, but I'm told that
20 Defendants have subsequently produced certain financial
21 data. Is this a live issue, or is this basically mooted at
22 this point?

23 MR. DAVIS: I believe it's a live issue, Your
24 Honor, because we have asked for affirmative
25 representations that the data we've got -- we've received

1 is the only data. And we have not received an unequivocal
2 answer to that.

3 And I -- during the meet and confer that we had
4 prior to this hearing, you know, I think we were going to
5 go -- both sides were going to go back, take a look at
6 what's been produced, and evaluate where we were on that.
7 We did that.

8 THE COURT: Well, I gather that any additional
9 financial information that's been produced relate to
10 specifically accused products?

11 MR. DAVIS: Well, that -- that is certainly true,
12 Your Honor. It -- it does relate to -- the only financial
13 information we've received relates to specifically accused
14 products. And if Your Honor --

15 THE COURT: Let me finish, Mr. Davis.

16 MR. DAVIS: Yes. I'm sorry, Your Honor.

17 THE COURT: Don't cut me off, please.

18 MR. DAVIS: I'm sorry.

19 THE COURT: I mean, if the Court finds your
20 arguments meritorious and orders additional production
21 along the lines you've asked to be compelled, then I assume
22 once that's produced from an operations and functionality
23 standpoint, then they'll need to be a subsequent but
24 companion production of financial data once that's done, as
25 well, and those additional products are sorted out?

1 MR. DAVIS: That's correct, Your Honor.

2 THE COURT: So -- okay. What else do you have for
3 me?

4 MR. DAVIS: I just would -- if I could point Your
5 Honor to Tab 10.

6 THE COURT: Okay.

7 MR. DAVIS: This is -- this is for NetScout the
8 financial production. It's a one-page document that
9 summarizes at the level you see here sales for financial
10 years '15 through '19.

11 And I will note, Your Honor, for the record that
12 this is attorneys' eyes only. And we will -- would like to
13 seal this portion of the transcript, but it's a one-page
14 document. And we've been --

15 THE COURT: Well, if you're going to go into the
16 specifics of what's set forth here, then the proper method
17 would be for you to ask the Court to seal the courtroom
18 before you go into those specifics. If you're just going
19 to describe what I see on the page before me from a high
20 level and not get into the confidential particulars, then
21 there's no need to -- to seal or later redact.

22 MR. DAVIS: Thank you, Your Honor. I believe we
23 can -- we can go with the latter.

24 THE COURT: Okay.

25 MR. DAVIS: So with that said, you know, this is

1 what we've received, and we express severe concern about
2 this level of production to the Defendants that -- that
3 this is insufficient level of granularity of financial data
4 to enable us to put together an infringement report on
5 damages.

6 And the response that -- our understanding of the
7 position -- of Defendant's position is, well, we've asked
8 for financial information from the client, and this is what
9 we've received.

10 And we've asked them to push harder on their
11 client because this can't be all there is. And so in
12 reviewing their production, their subsequent productions
13 from the date that this was produced, which was in January,
14 we don't see any more granular data in their production.
15 And I'm happy to be corrected on this. There's no more
16 granular data than this one-page summary.

17 In my experience in patent cases when we receive
18 the core financial data, it's a -- it's a spreadsheet that,
19 you know, if you were to print it out, would go on for
20 hundreds of pages, if not more.

21 And so, you know, we're -- so I do believe that
22 the -- the financial production is -- is still an issue,
23 and I believe that -- well, one other point that I would
24 like to make, Your Honor, just on the -- the reasonably
25 similar products before I sit down is just that I believe

1 those products are going to be relevant for an independent
2 basis, and that's going to be related to damages and even
3 potentially non-infringing alternatives.

4 And so, you know, to the extent that we've sought
5 discovery about the functionality of these other products,
6 how they work, what their pricing information is, their
7 finance -- financials are on the other products, we do
8 think that they're potentially relevant to -- to damages
9 and should be produced for those reasons, especially to the
10 extent that Defendants would -- would argue or rely on any
11 of those other products if they have the same functionality
12 as non-infringing alternatives.

13 So that was just one point I wanted to make to
14 circle back to the reasonably similar products issue.

15 THE COURT: All right. What else?

16 MR. DAVIS: With that, Your Honor, I don't have --
17 unless you have some more questions, that's all I have.

18 THE COURT: Let me hear from the Defendants in
19 response, please.

20 MR. BURESH: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. BURESH: Eric Buresh on behalf of Defendants.
23 Do you have a preference, Your Honor, on which issue to
24 discuss first?

25 THE COURT: Not really. Let's -- let's -- why

1 don't we take up the similarly functioning products, and
2 then we'll talk about the financial data side of it.

3 MR. BURESH: Thank you, Your Honor.

4 With respect to the reasonably similar products
5 issue, I would call it the non-accused products issue. And
6 the reason I -- I say that is because I -- I believe the --
7 the inception of this issue and -- and the focal point of
8 this issue has to be on the infringement contentions.

9 And not only what was disclosed but also the role
10 they play in the case.

11 During Plaintiff's argument, two cases were
12 mentioned, GeoTag and TiVo. Both were your cases, so I
13 assume you're familiar with them.

14 Before I get to TiVo, which I think is the most
15 related case here, I'm going to note in -- in GeoTag and
16 really in both cases, the issues were before the Court on a
17 motion to compel discovery. The question in both cases
18 was: Do the Plaintiff in those respective cases get
19 discovery into a product that was not identified in the
20 infringement contentions?

21 So when Mr. Davis argues the chicken and egg that
22 Your Honor referred to, I don't believe that's the right
23 question, because it's -- it's sorted out in the case law.

24 If you identify in your -- in your infringement
25 contentions products that you want to pursue, you can take

1 discovery into those products. If you don't identify them
2 and you want to rely on reasonably similar language in your
3 infringement contentions, then, according to GeoTag, there
4 are questions that must be answered by the Plaintiff before
5 you get to take that discovery, one of which is simply are
6 they products that operate in a manner that is reasonably
7 similar to the theory of infringement in your infringement
8 contentions?

9 The thing I wanted to note about the GeoTag case
10 before we get into the -- the real substance of that is
11 that the first question you asked, Your Honor, of GeoTag
12 was for an explanation for why the products they were now
13 seeking discovery on were not in the infringement
14 contentions. And I think that's an important question in
15 this case, as well.

16 Since the -- since the briefing on this motion
17 closed, Your Honor, Implicit filed -- and this is with
18 respect to Defendant, Sandvine, which is not applicable to
19 NetScout. But with respect to Sandvine, Implicit filed a
20 second lawsuit on March 19th, specifically identifying
21 PacketLogic as a -- as a product that's at issue in that
22 case. The docket number on that is 2:19-CV-41.

23 And I think that's interesting that -- that they
24 accuse it of infringement in a second lawsuit and did not
25 identify it in the original contentions in this case.

1 Also interesting is that that complaint referenced
2 a notice letter sent by Implicit in December of 2014 to
3 Procera Networks, which was the precursor that originally
4 was the PacketLogic company. They provided -- Implicit
5 provided Procera with a notice letter dated December 19th,
6 2014, specifically accusing PacketLogic of infringement.

7 So Implicit was aware of PacketLogic. Implicit
8 thought PacketLogic was subject to allegations of
9 infringement, and PacketLogic was not identified in the
10 infringement contentions in this case. That's a problem.

11 With respect to NetScout -- could I turn on the
12 ELMO, please?

13 THE COURT: Let me ask you this, counsel.

14 MR. BURESH: Yes, Your Honor.

15 THE COURT: What I hear you arguing -- and correct
16 me if I'm wrong, but what I hear you arguing is that when a
17 Plaintiff files suit and presents initial infringement
18 contentions based on what's available in the public domain
19 and then says something like together with other reasonably
20 similar products that do A, B, and C, which is effectively
21 what we have here, what you're telling me is Plaintiff
22 should know what those reasonably similar products are and
23 should accuse them with specificity in their initial
24 contentions, and they shouldn't come to us to tell them
25 what is reasonably similar based on the same operability or

1 functionality. And because they didn't do that, the door
2 is closed, and they don't get any discovery on those
3 additional products? Is that really your argument?

4 MR. BURESH: It's finer -- it's a finer point than
5 that, but that is very close to the analysis in -- in TiVo
6 versus Samsung.

7 THE COURT: Well, in TiVo versus Samsung, they
8 accuse certain DVRs, and then said other DVRs having the
9 same or similar functionality. That's a pretty broad
10 brush.

11 Here, we're talking about specific products that
12 have been accused, together with products that perform
13 certain specific applications and steps. That's much more
14 so than just saying other DVRs that have similar
15 functionality. I mean, you've -- you've gotten more notice
16 here than the Defendants got in the TiVo case. I think --
17 at least it's my opinion, you've gotten more notice.

18 This is not a scatter shot and anything else
19 that's similar, which is really what happened in TiVo.
20 Here, you've got gotten specific products, together with
21 other similar products that do A, B, C, and D. So you've
22 gotten a lot more specificity, and you've been given a much
23 more effective notice on the front end here than the
24 Defendants got in the TiVo case.

25 And, to me, that's -- that's a point that has some

1 difference and some -- some weight to it.

2 MR. BURESH: Your Honor, in the infringement
3 contentions, the product identification was the nGeniusONE
4 Service platform -- I'm going to speak in terms of
5 NetScout -- and then the language in the infringement
6 contentions is Implicit seeks discovery from Sandvine as to
7 all reasonably similar products. So that's with reference
8 back to the nGeniusONE -- nGeniusONE products that are
9 reasonably similar to the nGeniusONE, including all
10 Sandvine products that perform application layer
11 inspection, layer 7 inspection, deep packet inspection, or
12 a similar process.

13 I would argue, Your Honor, that that is the exact
14 same -- in this context of this market space, that is the
15 exact same thing as saying DVR functionality, the reason
16 being, deep packet inspection is simply saying I have a
17 network product that looks below layer 4 in a packet.
18 That's -- that's all it's saying.

19 And what we're talking about there, Your Honor,
20 and I'm going to get into specifics here, routers do deep
21 packet inspection. Firewalls do deep packet inspection.
22 Network analytics products like the ones that were actually
23 accused or specifically identified do deep packet
24 inspection. Network diagnostic products that you can plug
25 into a network to figure out which blade on a server is

1 malfunctioning, those do deep packet inspection. Virtually
2 everything that plugs into a network and does anything with
3 packets does deep packet inspection.

4 THE COURT: Well, let me ask you this. Given
5 that -- given that representation, why didn't both sides
6 get together and you say, Plaintiffs, what you've asked for
7 is not precise enough, it's too broad a net, it captures or
8 potentially captures a lot of things that are not a part of
9 what you're targeting here? If you'll give me more refined
10 descriptors, then we'll try to produce these additional
11 data points on reasonably similar products with more
12 clarity?

13 And -- and I assume you're going to tell me you
14 did that and Plaintiff wouldn't comply. Plaintiff's going
15 to tell me you didn't do it, and that's why we're here
16 today. But, you know, what you're telling me is, they
17 didn't tell me enough, and that's why I'm here.

18 Well, my question is: Why didn't -- why didn't
19 you ask them to tell you enough? And why didn't they
20 respond? And why didn't this get worked out? And why am I
21 sitting here taking my time where both sides are dug in
22 with one saying they won't tell us what's reasonably
23 similar and the other one says they won't tell us what
24 reasonably similar means? Can you answer that question?

25 MR. BURESH: I can, Your Honor, to the best of my

1 ability.

2 THE COURT: We can all only answer to the best of
3 our ability, counsel.

4 MR. BURESH: At the time of the infringement
5 contentions, there was not an issue. And -- and I say that
6 because, you know, there's two prongs under -- under the
7 GeoTag and also the TiVo case.

8 The first one is a specific theory of
9 infringement. We've never really contested that because
10 these contentions are -- are -- they do provide a theory of
11 infringement.

12 And if I can take you back to Tab 2 of Plaintiff's
13 binder.

14 THE COURT: All right.

15 MR. BURESH: And turn to Page 3 where, as
16 Mr. Davis said, you start getting into the meat of the
17 contentions.

18 When you walk through the -- the substance of
19 their contentions, you're going to see this concept of ASI
20 technology in virtually every element of their claim and
21 highlighted. ASI technology is -- is what NetScout called
22 adaptive services intelligence technology. That's
23 NetScout's patented next generation deep packet inspection
24 engine, et cetera.

25 If you turn the pages, you're going to see ASI

1 technology over and over as you go through these
2 contentions. And that makes sense in the context of -- of
3 these claims. We understood why they were accusing the ASI
4 technology. That is network analytics. It is -- it is
5 what -- when you -- when you look at these patents talking
6 about creating paths, Your Honor may remember the
7 distinction between dynamic path creation and static path
8 creation from an earlier Markman hearing.

9 The reason why they're pursuing this adaptive
10 services technology is that it's their position that that
11 is the dynamic aspect, that you can dynamically make
12 adjustments and create paths.

13 We see that over and over again in their
14 infringement contentions and similar -- similar contentions
15 against Sandvine. And that tells us, okay, we're dealing
16 with network analytics. We're dealing with this type of
17 service intelligence.

18 What we did, Your Honor, at that point, we didn't
19 draw any hard lines. They identified the nGeniusONE. But
20 we knew at NetScout that there was InfiniStream product
21 lines that used ASI. We knew there were applications that
22 used data that were supplied by ASI engines.

23 We provided -- literally if you -- if you bucket
24 anything that touches ASI, irrespective of whether the
25 Plaintiff has specifically identified those products, we

1 provided discovery into it because that's what we were on
2 notice of. And that was not disputed. It was not fought
3 about. We just did it voluntarily.

4 You wait four and a half months into the case, and
5 we get a 30(b)(6) notice from Implicit. And now we have a
6 definition of accused functionality where they have
7 literally gone through -- if I could put this up on the
8 ELMO.

9 This is a printout of NetScout's website from
10 February of '04, 2018, and the reason I captured that data
11 is that's around the date of the complaint.

12 What they did four and a half months into
13 discovery is to go through this page of the website and
14 laundry list all of these products, and say we want
15 discovery and a 30(b)(6) deponent into all of them.

16 If we look in the upper left-hand corner, you see
17 core offerings. One is the nGeniusONE, and I also
18 mentioned InfiniStream under the monitoring platforms and
19 the ISNG platform. Those all roll up. They use ASI data.
20 We provided discovery into, like I said, anything that
21 uses, generates, works with ASI data. We did that.

22 You also see a core product offering Arbor.
23 That's one of them that we're calling a non-accused
24 product. It's not listed in -- in the infringement
25 contentions, and it doesn't do even the same things. It

1 doesn't do network analytics. It's a security product.

2 It's a firewall, if you will.

3 What Arbor does is, is it helps people remedy
4 distributive denial of service attacks. Has nothing to do
5 with ASI.

6 Four and a half months into a case, if I now have
7 to start going through discovery on a completely separate
8 product line, completely unrelated, doesn't even do the
9 same things, I'm talking different code, different
10 witnesses, different document production, different
11 business units, it's all different.

12 Why when I look at contentions, Your Honor, that
13 identify nGeniusONE and they talk about extensively ASI
14 data and ASI technology in the context of network
15 analytics, why would I be on notice that I need to start
16 producing firewall information, DVOS information.

17 THE COURT: Then -- then tell me why NetScout's
18 30(b)(6) witness, Mr. Barrett, testified there were certain
19 non-accused products that perform the core functions
20 identified in the accused products? Why is your 30(b)(6)
21 witness saying there are other products out there?

22 MR. BURESH: Oh, he didn't say that. The core --
23 he very specifically said: These other products do not do
24 the core functionality identified in your infringement
25 contentions. The questions he was being asked is: Do you

1 have other products that utilize deep packet inspection?

2 And his answer across the board would have to be
3 yes to that. Virtually every one of these products uses
4 deep packet inspection.

5 That's not the right question. Even under the
6 standard in -- in GeoTag and -- and TiVo, the question is:
7 Does it operate in a reasonably similar manner to the
8 theory of infringement identified in the infringement
9 contentions for the listed product?

10 None of these other products do ASI. None of
11 these other products that they're trying to pursue even do
12 the same type of network analytics. They're completely
13 different product lines.

14 THE COURT: Well, it seems to me that what you're
15 telling me is Plaintiffs should be limiting their inquiry
16 to other products that do ASI, and Plaintiff hasn't told me
17 that's the focus of our inquiry.

18 Plaintiffs use the language that's in and
19 associated with their initial contentions about the app --
20 application layer inspection, layer 7 inspection, deep
21 packet inspection, et cetera. And I understand that what
22 we're getting down to, which is usually what we get down to
23 is the Defendant telling me that's too broad a brush. And
24 the Defendant -- Plaintiff telling me, no, it's not. And I
25 don't -- I won't know until I see. And that's where these

1 kind of arguments usually end up.

2 It may well be that based on tying future or
3 similarly situated products -- reasonably similar products
4 to ASI, that you've done what you need to do, but the --
5 the tie to ASI seems to be a matter of your creation and
6 your understanding. I'm not hearing that from Plaintiff.

7 Now, if Plaintiff agrees that the ASI
8 functionality is the common thread and that the application
9 layer inspection -- layer 7 inspection, deep packet, et
10 cetera, if that's a broad enough -- or an overly broad
11 enough pathway that's going to bring in routers and other
12 things that aren't conceivably a part of the targeted
13 accused products, that's another thing.

14 But, I mean, what I -- what the Court is often
15 confronted with are two different sets of criteria, one
16 broader than the other, and that's where these -- that's
17 where these problems arise from, and that's where the
18 discussions and agreements seem to break down.

19 You know, in your view of what the case should be,
20 perhaps it is, that it should be only limited to products
21 that operate under the ASI technology.

22 Again, that's your side of the story, and I'm not
23 hearing that from the other side.

24 MR. BURESH: And -- were you done? I don't mean
25 to --

1 THE COURT: Yeah. Yeah, I am. I mean, I'd like
2 you to address that -- that disconnect between both sides
3 to the extent you can.

4 MR. BURESH: Your Honor, I -- I mean this with the
5 utmost respect, I'm going to quote back your language from
6 TiVo, because I think it's -- it's highly relevant.

7 The -- and you said, referring to the 3-1
8 contentions: This disclosure is intended to put Defendants
9 on reasonable notice of what products are accused. And you
10 were referring to the specific listing of products.

11 This is about why Plaintiff did not list these
12 other products that were publicly available. Why are they
13 not listed in the infringement contentions?

14 You go on to say: TiVo expects Samsung to locate
15 remaining Samsung products that might be implicated by
16 TiVo's infringement theory. However, it is TiVo, not
17 Samsung, who knows best what its infringement theory is.
18 Samsung was not properly on notice that a previously
19 unnamed product might be implicated based on the original
20 contentions. TiVo cannot simply rely on, quote, same or
21 similar functionality language to sweep in additional
22 products that have not been identified with sufficient
23 specificity in the original contentions.

24 And I believe the question that comes out of that,
25 Your Honor -- out of that discussion is do the infringement

1 contentions put the Defendant on notice, not forcing us to
2 guess about what's at issue in the case, but do they put us
3 on notice of other specific products that may be
4 implicated?

5 THE COURT: I think that's clearly the question.
6 The -- the answer to that question lies in the language
7 that Plaintiffs have used in their initial contentions
8 naming, you know, nGeniusONE for NetScout and NAVL for
9 Sandvine, together with reasonably similar products,
10 including products that perform application layer
11 inspection, layer 7 inspection, deep packet inspection, or
12 a similar process.

13 That's certainly more description and more
14 targeted focusing than DVRs with similar functionality.
15 That's what we had in TiVo. Is it enough to put you on
16 reasonable notice with regard to what the Plaintiff is
17 asking for now, and that's -- that's the ultimate question.

18 MR. BURESH: It is, and -- and --

19 THE COURT: And you're telling me it's not, and
20 Plaintiff is telling me it is.

21 MR. BURESH: But what I'm telling you, Your Honor,
22 is -- and I believe what -- what you may be doing -- I
23 don't want to put words in your mouth, but you focused in
24 on application layer inspection and deep packet inspection,
25 and you're saying you could have guessed that they wanted

1 anything that had deep packet inspection, and, therefore,
2 you're on notice of anything that has deep packet
3 inspection. But those are qualifiers to reasonably similar
4 products, to the one that was identified, nGeniusONE. This
5 is their language.

6 They seek discovery as to all reasonably similar
7 products, including -- and then they go on and provide
8 qualifiers for what that might be. Were we on notice that
9 a firewall product is reasonably similar to a network
10 analytics product?

11 THE COURT: Well, the problem here, counsel, is
12 that Defendants always want me to hold Plaintiffs to a
13 standard of naming with specificity precise products and
14 holding you to that list.

15 And I regularly hear that any other description in
16 the term -- in the nature of a catch-all based on similar
17 functionality with some fair description of that
18 functionality is overly broad, and the Plaintiffs should
19 have named those specific products.

20 And I hear from Plaintiffs that the catch-all
21 should cover the universe. And even as in TiVo, if it just
22 says similar functionality without any other clarification
23 or -- or information, that's enough to open the door to
24 whatever you can find. And both views are wrong.

25 The initial contentions are targeted to put the

1 Defendant on reasonable notice, and that's reasonable.
2 It's not perfect notice. And the Plaintiffs have got an
3 obligation to go as far there as they can reasonably go
4 with the publicly available information they have and not
5 just throw out a product together with anything else that
6 might function like it.

7 And so there's a middle point in my view between
8 what both sides go to their respective corners and argue
9 about. And that's the kind of approach that I think both
10 GeoTag and Net -- and TiVo support.

11 And in TiVo, it wasn't enough. In other cases, it
12 was. And it depends on the particularity of the initial
13 contentions. And at the end of the day, I've got to decide
14 did Plaintiff meet their minimum burden to put you on
15 reasonable notice to go beyond the specific products that
16 they've identified and get into those potentially
17 additionally infringing products.

18 And I will just tell both of you, arguing to me
19 that your end point on the spectrum is right and the other
20 person's end point on the spectrum is wrong is not going to
21 move the ball in a productive way. Show me that these
22 initial contentions fall short of reasonably notifying you
23 based on what Plaintiff had to work with from in the public
24 domain at the time and that there is no reasonable basis
25 that you should have been on notice that these type

1 products today would have been captured by those initial
2 contentions, not holding them to just the -- the specific
3 products they identified.

4 And don't come in here, Plaintiff, and tell me
5 just because you said together with anything else that
6 operates or functions in the same way, you have a blank
7 check to go anywhere you want to go, because those are both
8 losing arguments.

9 So let's get to the middle, and let's talk about
10 what's reasonable here, not what both of you want to tell
11 me from your diametrically opposed end points on the
12 spectrum, because that's what I'm hearing, and that
13 doesn't -- that doesn't solve our problem.

14 And I don't have all day to coax you out of your
15 respective extreme positions toward some point of
16 reasonable middle ground. And that's being as candid with
17 both sides as I know how to be.

18 So based on that high-level overview of how the
19 Court's going to approach this, let me hear whatever else
20 you've got to tell me from the Defendant's side and then
21 move on and address the financial side because this half a
22 page of one sheet of paper doesn't look like it could
23 reasonably be a fair disclosure of adequate financial
24 information as to the products that we know about today,
25 not -- not particularly -- not potentially future products,

1 all right?

2 MR. BURESH: Your Honor, with respect to the --
3 with respect to the reasonably similar or the non-accused
4 products issue --

5 THE COURT: I mean, you've argued to me in your
6 briefing that additional products made by somebody else
7 that you later acquired can't possibly be reasonably
8 similar.

9 To be -- to be honest with you, that's a
10 non-starter. They can be. It doesn't matter who built
11 them. When you acquired them, they have a certain
12 functionality. And if that functionality is within the
13 reasonable scope of what Plaintiffs put you on notice of,
14 it doesn't matter whether you originated them, or they came
15 from someplace else, and you acquired them. That -- that
16 argument is not going to -- not going to help your cause.

17 MR. BURESH: In all candor, what I'm looking at
18 as -- as a -- a middle ground, there are -- so what we
19 provided, and we did go, as I said, beyond the specific
20 product listings. We -- considerably with respect to both
21 of the Defendants. So we didn't do the bright line that I
22 think you're talking polar -- the polar extreme position
23 that you see from some Defendants.

24 THE COURT: You went as far as you were
25 comfortable, and you stopped. That's what happened.

1 MR. BURESH: We went as far as --

2 THE COURT: And the Plaintiff wasn't comfortable
3 with as far as you went, and the Plaintiff's is telling me
4 they need more.

5 I tell you what I'm going to do, counsel. You're
6 fortunate to be here on a day when I don't have a
7 jam-packed schedule. I'm going to recess for 30 minutes.
8 And at 11:30, I'm going to be back on the bench. And I
9 want you to meet either here or in a conference room, and I
10 want you to try really hard to solve this problem in light
11 of the guidance and the comments that I've given you from
12 the bench. And then I want to see if we still have an
13 issue to fight about. Hopefully, we don't.

14 In the worst case scenario, it ought to be a whole
15 lot closer than it is right now. I'll be back at 11:30.
16 You've got 35 minutes.

17 The Court stands in recess.

18 COURT SECURITY OFFICER: All rise.

19 (Recess.)

20 COURT SECURITY OFFICER: All rise.

21 THE COURT: Be seated, please.

22 All right. Counsel, you've been meeting and
23 conferring for the last 30 or 35 minutes. Let me know
24 where you are.

25 MR. DAVIS: Bo Davis on behalf of the Plaintiff.

1 Your Honor, we met and conferred during the break,
2 and the parties have reached an agreement that will moot
3 the motion to compel.

4 The terms of the agreement are that the Defendant
5 will produce source code and financials as to certain other
6 products that the parties have agreed to.

7 Plaintiff, Implicit, will then serve proposed
8 amended infringement -- source code-level of infringement
9 contentions, after which the parties will meet and confer
10 on a motion for leave to amend the contentions and any
11 other impact on the case that such a motion might have.
12 That's the agreement of the parties, Your Honor.

13 THE COURT: All right. Let me hear confirmation
14 from Defendants that that, in fact, as recited in the
15 record, accurately reflects the agreement of both sides.

16 MR. BURESH: This is Eric Buresh, Your Honor, and
17 it does.

18 THE COURT: All right. Mr. Davis, this is your
19 motion. You indicated that this agreement moots it. For
20 purposes of the record, I can deny it as moot, based on the
21 parties' agreement, or you can withdraw it. Do you have a
22 preference?

23 MR. DAVIS: We prefer to withdraw it, Your Honor.

24 THE COURT: Okay. Then I'll look for an unopposed
25 motion to withdraw the motion to compel shortly, and I'll

1 assume the parties are going to proceed forward working
2 together pursuant to the agreement that's been announced
3 into the record.

4 Counsel, I think -- I think this is a better
5 result than might otherwise have been achieved. I
6 appreciate your constructive efforts this morning while you
7 were here together.

8 I always find when lawyers are sitting down
9 face-to-face, things get done more efficiently than when
10 you're a name at the end of an email chain. So thank you
11 for being here.

12 That will complete the hearing. The motion to
13 compel is withdrawn. And you're excused.

14 COURT SECURITY OFFICER: All rise.

15 (Hearing concluded.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/20

4/15/19
Date